(2)

No. 06-711

In The

Supreme Court of the United States

MICHAEL HANNING LORIZ
and CARA FRANCKE LORIZ,

Petitioners,

v.

JOHN B. CONNAUGHTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The availability of equitable relief to victims of constitutional violations associated with an improper taking of property is a question of national import that this Court has recognized but has yet to resolve.[1] The challenged order of the Sixth Circuit Court of Appeals exemplifies the need for review: if allowed to stand, it would establish a circuit court precedent that lawful owners of real property do not have the fundamental right to safely use their property without threat of harm from dangerous and illegal State-authorized activities trespassing from adjacent property so long as an economic remedy is at hand.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari fails to address the constitutional questions raised in the Petition. It relies instead on misrepresentation of facts and lower court rulings which are not in question here. The lack of substantive constitutional argument demonstrates both the untenable character of the challenged ruling and the indefensible nature of the shooting these Respondents authorize.

REASONS FOR GRANTING THE WRIT

The Respondents' brief is a regurgitation of defense assertions in the case pending before the Sixth Circuit. It offers little insight into the debate on whether equitable relief should be barred for all takings claims. The Court may find value in it, however, as justification for the exercise of its supervisory powers.

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[1] *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003).

I. THE RESPONDENTS OFFER NO SUBSTANTIVE OPPOSITION TO THE WRIT

Rather than addressing the petition questions, the Respondents assert that this Court cannot hear this case. Such an assertion belies simple facts on the record below. The Sixth Circuit Court of Appeals acknowledged not only jurisdiction to rule on a preliminary injunction motion but also the Petitioners' likelihood of success on the merits of their appeal. The Respondents' unwillingness to accept these facts does not justify this Court's review of arguments that have yet to be decided by the Sixth Circuit, and that are not germane to the issue at hand. Importantly, these arguments misrepresent the district court ruling and are inherently contradictory.

A. This Court Has Jurisdiction: *Rooker-Feldman* Cannot Apply to Claims Dismissed as "Unripe"

The primary argument presented by the respondents is a lack of jurisdiction. Unfortunately, this argument is undermined by a lack of understanding of the underlying doctrines and by repeated misrepresentation of rulings below.

The district court dismissed only judicial defendants pursuant to *Rooker-Feldman*. In dismissing the Respondents, the district court held:

> . . . it is manifest that Plaintiffs' Fifth Amendment takings claims, and the ancillary procedural and substantive due process claims . . . must fail for the same reasons that they cannot succeed against [other] defendants . . . *i.e.,* Plaintiffs' takings claims are not ripe for adjudication, *see Williamson County* . . . Petition App. 22a-23a.

The takings and "ancillary" claims were dismissed by the court "without prejudice." Such claims cannot be simultaneously unripe and barred by *Rooker-Feldman*.

The state court has never ruled on the legality or constitutionality of the county permit and has never ruled on the state license at all. Therefore, federal jurisdiction lies. See *Exxon Mobil v. Saudi Basic Industry Corp.*, 544 U.S. 280 (2005); *Coles v. Granville*, 448 F.3d 853 (6th Cir. 2006) and *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386 (6th Cir. 2002).

The Respondents state that the "lower courts' decisions," including the Sixth Circuit injunction denial, "were supported by several federal court doctrines which operate to bar the petitioners' requests for relief. Most notably, this Court's *Rooker-Feldman* doctrine . . . " Respondents' brief, p. 5, ¶2. This is one of many misrepresentations in the brief. The Sixth Circuit injunction order held that Loriz has a likelihood of success on appeal and never cited *Rooker-Feldman*.

B. The Lower Courts Did Not Abstain

The second argument presented by the respondents is as follows: "The Lower Courts Correctly Abstained From Reviewing the Matter." Respondents' brief, p. 13.

This statement is patently false. Neither the district court nor the Sixth Circuit invoked abstention doctrine in any ruling and did, in fact, rule. The district court was asked to abstain pursuant to the *Burford* doctrine[2] but did not do so. By failing to object to the lack of abstention in

[2] Ridge Wind motions, Case No. 1:05cv306, R.70, p. 3, R.86, p. 8.

the magistrate's Report and Recommendations, the defendants waived later abstention arguments. *Thomas v. Arn,* 474 U.S. 140, 155 (1985).

Furthermore, the defendants have not demonstrated the prerequisites of the abstention doctrines they cite. The state civil suit, which includes only private actors[3] as defendants, is in no way parallel to this §1983 suit against some 20 state actors, and cannot qualify for *Colorado* abstention.[4,5] The *Pullman* abstention cannot apply – defendants have never pointed to a state law that could be clarified in order to obviate the necessity of federal litigation. Finally, enjoining one private shooting range will not disrupt a complex regulatory scheme; the challenged county permit and state license are hardly on par with the Texas oil industry in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Furthermore, the repeated re-authorization of the shooting activities by state actors with full knowledge of the inherent lead shot threat raises these claims beyond state court nuisance and trespass issues.

The Respondents' arguments seem contradictory. When abstentions apply, the federal court inherently HAS

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[3] Those private actors have recently stipulated to the dismissal of the entire state civil suit. All arguments related to a state civil suit will soon be moot.

[4] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1975).

[5] The Respondents argue that the Butler County Common Pleas Court should hear all claims (p. 6, ¶2). They fail to note that all judges sitting on that court have recused themselves from Loriz cases. Petitioners strongly suggest that the state court cannot adequately protect their federal rights, a *Colorado* abstention criterion the Respondents ignored. *Romine v. CompuServe Corp.*, 160 F.3d 337, 340 (6th Cir. 1998).

jurisdiction of claims, concurrent with the state, but should abstain from using it.

C. The Respondents' Raise an Unsupported "Finality" Argument for the First Time

The Respondents assert for the first time that Loriz has failed to obtain the final administrative decision required for federal takings claims pursuant to *Williamson County*. Respondents' brief, p. 27, ¶1; p. 29, ¶2.

The district court made no such finding. Because Loriz did not pursue and complete "state court action seeking just compensation for the alleged inverse condemnation of their property, their instant action for claims of an unconstitutional takings is not yet ripe for adjudication." Pet. App. 12a, ¶3. The ruling does not question finality.

The district court did, however, enumerate the administrative appeal proceedings leading to the final decision of the Twelfth Appellate court to uphold Mr. Keller's permit. Pet. App. 8a, ¶2. Loriz suggests this new argument is also waived below, as abstention arguments were, pursuant to *Thomas v. Arn*, *supra*.

Because the challenged permit was adjudicated in state court to finality, the Respondents' argument implies that Loriz is required to pursue some additional form of administrative relief. But relief from what? There is no further administrative process to gain relief from the conditional use permit the BZA granted to Mr. Keller.

Loriz does not suffer from a burdensome section of zoning law applied to their own property for which further relief can be sought. Quite to the contrary, these Respondents granted a permit to a neighbor that simply does not exist in the zoning law.

Importantly, Loriz did seek a different form of relief from the BZA. As pleaded, they made multiple variance requests to the BZA to split their property beyond the shotfall zone. Pet. App. 34a, ¶24. The BZA denied these requests and *res judicata* bars additional efforts.

Further relief from the BZA could only invite further degradations of Loriz rights. The last time Petitioners traveled to Ohio for a zoning hearing, Mr. Loriz was physically removed from the hearing, without provocation, prior to being able to speak.

Inherent in the Sixth Circuit's order are important legal findings: that Loriz property is physically invaded by ballistics and that Loriz is likely to succeed on a private-use takings claim. Physically invaded property has inherently reached "finality" and private use takings are exempt from *Williamson County* tests. The Respondents' arguments are misplaced.

II. THE RESPONDENTS' BRIEF SUPPORTS THE NEED FOR INJUNCTIVE RELIEF

While the Respondents' legal arguments are better left to the Sixth Circuit, the Respondents' inability to honestly represent the activities they authorize implicates those activities and supports the need for injunction.

A. The Respondents Misrepresent the Challenged Activity and Acknowledged Takings

The Respondents avoid mentioning key facts in their brief. They characterize the permit they granted to Ridge Wind as one "to operate field trials for its patrons, sportsmen wishing to train and exhibit their hunting dogs' abilities." Respondents' brief, p. 3, ¶2. They mention neither shotguns nor shooting until page 29 of their 30-page brief: "In the instant case, the petitioners have been subject

to acts of private individuals, perhaps careless, shooting into their property during field trial events."

In fact, these Respondents approved shooting activities knowing they would result in shots entering the Loriz property. Testimony by various defendants, including Respondent William Balsinger, to the Board of Zoning Appeals demonstrates this fact. Reply App. 1.

These Respondents also practically and prospectively barred prosecution of any of the "careless" patrons who shoot into our property, no matter the evidence in hand. Petition App. 40a-41a. This impunity has been asserted despite the Respondents' contention that the "patrons could be . . . subject to prosecution for any criminal violations." Respondents' brief, p. 29.

The assertion that the Petitioners "have statutory remedy under Chapter 163 of the Ohio Revised Code" (p. 18) concedes that the Loriz property has been taken. It errs, however, in assuming that the taking was a proper one. Ohio law does not authorize physical takings by any of the Respondents nor by illegal activities. Importantly, Ohio law bars the taking of agricultural property (Petition, p. 27-28), a legal reality the Respondents do not refute.

The Respondents also do not refute that this taking is for a private use; ORC 163 cannot apply.

Respondents' assertions that the Petitioners are not victims of a *per se* physical taking are contradicted by their own statements, particularly the acknowledgement of "careless" patrons shooting into the Loriz property. The argument is also belied by the district court finding that the county conditions placed on the permit "were wholly insufficient to protect Plaintiffs and their property." Pet. App. 8a, ¶1.

The need for bodily protection obliterates any assertion that this is a purely regulatory taking. The activities

authorized by these Respondents do not merely reduce the value of property. They forced a family to flee their home as acknowledged by the Sixth Circuit order.[6]

Respondents assert that Loriz has not properly sought injunctive or declaratory relief for the taking (brief, p. 21-22). As pleaded, injunctive, declaratory and economic relief were clearly sought from the outset of this suit. Pet. App. 45a.

B. Loriz Property Use Is Criminalized

The Respondents aver that injunctions are only available for pre-deprivation facial challenges, or for taking victims whose property use has been criminalized. Respondents' brief, p. 7, 22-25. This argument is more to the point of the petition questions raised. However, implying that criminalization is a "per se rule(s) to qualify for injunction" appears to be unprecedented. *Ibid*, p. 7, ¶2. If it truly is an injunction rule, the Respondents are mistaken; Loriz property use has been criminalized.

Although Butler County officials have barred prosecution of any shooters on the range, they have tried to prosecute Petitioner Mike Loriz for acts associated with the legal use of his property, charging him repeatedly and in violation of constitutional guarantees. See Pet. App. 39a-40a. Rather than opposing injunction, the Respondents' criminalization argument supports it.

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[6] Respondents compare this taking by shotgun fire to other adjacent commercial uses such as a golf course, motocross course or a landfill (footnote, p. 21). Of course, such uses are distinguishable; they do not violate Ohio firearms statutes intended to protect public safety.

C. Factual Errors and Deficiencies

Factual errors, in addition to those already cited, further indicate that the challenged acts cannot be honestly defended and warrant injunction. The Respondents assert that State of Ohio licenses[7] were "approved by the Ohio State courts and are still being litigated in the Butler County Court of Common Pleas." Respondents' brief, p. 15-16. This same statement was shown to be false in the Loriz reply brief to the Sixth Circuit and yet Respondents raise it to the U.S. Supreme Court.

Ohio law provides no administrative process by which to appeal Division of Wildlife licenses and permits. These approvals have not been and cannot be adjudicated in state court. This false statement is material to a brief invoking jurisdictional and abstention doctrine.

The Respondents state that Loriz has not "alleged that Butler County Zoning ordinances were defective or otherwise not in full force and effect." Respondents' brief, p. 17, ¶2. This is also false. Loriz has repeatedly alleged that the permit, identified as "a commercial recreational use permit" (brief, p. 3, ¶2) is not allowed by the Butler County Rural Zoning Resolution. This is not a matter of interpretation; no such legal instrument exists. Pet. App. 31a.

The Respondents have also misrepresented the Loriz motion for injunction pending appeal, the only entry in their appendix pertinent to federal litigation. Respondents' App. 53a. They include only the first page of the 19-page memorandum with no mention of the omitted pages or the 10 exhibits attached.

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[7] State licenses are required for shooting events and operations separately from the county zoning permit.

The Respondents attempt to argue that other defendants, the Kellers who did not oppose this Petition, would be irreparably harmed by an injunction. Neither the Kellers nor the Respondents demonstrated harm in their responses to the motion for injunction pending appeal. The Sixth Circuit took note of their responses, calling them "distinctly deficient" and stating that "such deficiencies are not what the court expects from counsel appearing before the Sixth Circuit." Pet. App. 3a. Raising such claims here, with no substantiation below, is likewise deficient.

Finally, Loriz asks the Court to note that these Respondents were the only parties to oppose the Petition. They were also the only defendants who never brought a dispositive motion to the district court. Claims against them were improperly dismissed *sua sponte* without so much as naming the individual claims, some of which are unique to these defendants. Their assertions now may be too little, too late.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Testimony on shots entering the Petitioners' property presented to the Butler County Board of Zoning Appeals

Judge John B. Connaughton, shooting range attorney:

> I'm not going to say that shot isn't going to rain, and I use that literally . . . (2-04-03)
>
> Obviously, nobody wants to be hit in the face no matter what distance, you know, if you have a pellet hit you in the eye it could and probably would cause damage. (7-17-01)
>
> . . . because of the dense foliage, because of the [Loriz] forest, there is no safety problem. (4-17-01)

Charles Keller, Ridge Wind shooting range operator:

> . . . if you want to get into the Revised Code, it actually tells you that you're not allowed to shoot in[to] . . . anybody's property. That means it's impossible to shoot . . . unless you're shooting straight up in the air or straight down at the ground. . . . (5-17-05)

William Balsinger, County officer

> I'd be willing to stand over at the Loriz's property and let you stand there at that fence and let you shoot the shotgun at me, not in my face, in my back and I guarantee you you're not going to hurt me . . . That's how much I think this is a bunch of hooey. (5-17-05)

Excerpted from Appellants' Brief to the Sixth Circuit Court of Appeals, Case No. 06-3427, p. 9.